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I. Overview — The Federal Common Law Debate; Is It Relevant? Is *Erie* (Or New *Erie*) Relevant To It?

A. *Introduction*

This year the Federal Courts Section of the Association of American Law Schools addresses questions of legitimacy and limits in the fashioning of common law by federal tribunals, a topic that has long fascinated scholars in the field. The literature is extensive, including significant articles by members of this panel.[1] Indeed, it is possible that there is nothing more to say. Professor Louise Weinberg has stated that the debate on constitutional and statutory problems "is so stale that sheer boredom ought to have put a stop to it . . . ."[2]

This observation should make us pause, but perhaps not stop us in our tracks. The Supreme Court's position lacks a clear doctrinal foundation and there remains substantial disagreement among commentators. Within the literature one can find strong advocates of what Professor Donald Doernberg has called the "polar" positions:[3] the view that all forms of federal common law are illegitimate,[4] and the view that the federal courts' power to

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1. Donald L. Doernberg, *Juridical Chameleons in the "New Erie" Canal*, 1990 UTAH L. REV. 759; Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985); Louise Weinberg, *Federal Common Law*, 83 N.W. L. REV. 806 (1989); Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 N.W. L. REV. 860 (1989). In this article both of these articles are cited as Weinberg.

2. Weinberg, *supra* note 1, at 845.

3. Doernberg, *supra* note 1, at 811.

4. This is the view of Professor Redish. *See infra* section IIA.

make law is co-extensive with the powers of the national government.[5] However, most analysts present some form of federal common law as legitimate, but emphasize the need for limits.[6] Even these middle grounders differ widely among themselves. Professor Martha Field approaches the polar position of unlimited federal common law, while Professor Thomas Merrill's insistence on the need for clear authorization to create federal common law points him in the opposite direction.

The debate remains lively, but is it relevant? One might argue that there are few areas in which federal common law exists. Additionally, the Supreme Court has made it clear that that scope will remain restricted,[7] and the lower courts have adhered to this view.[8] Thus we could be engaged in a discussion, albeit an interesting one, about a nonissue.

Before proceeding further, clarification of what is meant by federal common law is necessary. Professor Field offers the following definition: "any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments* — constitutional or congressional."[9] This captures the essence of federal common law, but I am uncertain about whether to put questions of authority in the definition. One could add in the definition itself a qualifier about the absence of a clear constitutional or congressional authorization. This qualifier can also be treated as a matter of limits, since it would focus our inquiry on "pure" or "freestanding" federal common law in cases where either the substance of a rule or the authority to make it raises questions about the federal courts as common law courts.[10]

For the moment I will emphasize and add the following qualifier to Professor Field's definition: "when the rule pertains

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5. This is the view of Professor Weinberg. *See infra* section IIB.

6. *See infra* section III.

7. *See* Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988).

8. *See* Amerifirst Bank v. Bomar, 757 F. Supp. 1365, 1372-74 (S.D. Fla. 1991) (refusing to create federal common law despite federal interest in savings and loan organizations).

9. Field, *supra* note 1, at 890.

10. The approach of other authors, when they define federal common law with specificity, is to treat questions of authority at a later, post-definitional stage.

to matters generally classified as substantive as opposed to matters of jurisdiction or procedure." This addition is important because it removes from our discussion a broad range of judge-made doctrines such as those concerning federal jurisdiction and abstention. Although these doctrines can be viewed as forms of federal common law in a broad sense,[11] I believe that they are best analyzed individually. Professor Gene Shreve, for example, has recently argued that constitutional limits on doctrines such as abstention can be found in article III.[12] His arguments do not affect the fashioning of substantive federal common law. Adding the qualifer also eliminates much of the classic "*Erie* problem."

The definition also suggests that it is possible to distinguish federal common law from statutory and constitutional interpretation. This issue is central to the entire discussion. Many commentators have noted that these three forms of judicial activity have important similarities.[13] Indeed, it can be said that the fact that any one of them is an accepted part of the judicial function helps legitimize the others. Even so, it is helpful to distinguish free-standing judicial rule making[14] from more guided inquiries. This kind of lawmaking is a principal feature of adjudication by *state* courts. One way of framing the broad question before us is: can federal courts act similarly to their state counterparts? Professor Weinberg insists not only that they can, but that they *do*. She finds it "curious that the debate over the legitimacy of judicial federal lawmaking goes on, while we watch the federal cases piling up."[15]

Implicit in Professor Weinberg's observation is a definition of federal common law that encompasses much of what the federal courts do. I prefer the narrower formulation not because it makes the inquiry go away, but because it focuses the inquiry. This definition leads to the realization that we are talking about a narrow phenomenon. As the Supreme Court stated in *Boyle v. United Technologies Corporation*,

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11. *E.g.*, Merrill, *supra* note 1, at 841.

12. Gene R. Shreve, *Pragmatism Without Politics — A Half Measure of Authority for Jurisdictional Common Law*, 1991 B.Y.U. L. REV. 767.

13. *E.g.*, Merrill, *supra* note 1, at 4-6.

14. *See* Weinberg, *supra* note 1, at 832.

15. *Id.* at 838.

> A few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts — so-called "federal common law."[16]

If there isn't very much federal common law, should we spend much time talking about it? I believe that there are several reasons why this discussion is worthwhile, totally apart from the fact that there is wide disagreement over what the law should be and how to get there.

B. *Federal Courts and Private Law — A New Frontier?*

First, the formation of federal common law in new areas generally involve the rights and duties of private individuals. Analyzing private law removes us from the dominant focus of recent federal courts scholarship, which has centered around the public law role of federal tribunals when individuals assert rights against governments and their officials. In stark contrast to the Warren Court, the Burger-Rehnquist Court has cut back sharply on the role of federal tribunals in public law. Areas such as *Younger* abstention,[17] the eleventh amendment,[18] and federal habeas corpus[19] are important issues in federal courts scholarship. Professor Richard Fallon has described the debate in this area as an ongoing contest between "federalist" and "nationalist" premises.[20] The retirement of Justice Brennan has weakened the nationalist side within the Court, but in academic ranks it remains the dominant view. When Professor Akhil Amar reviewed the third edition of the Hart and Wechsler Casebook, he looked favorably on changes from the original work, which was not in harmony with Warren Court approaches. Professor Amar found in the revised version a new awareness of "a resurgent vision of federal courts as irreplaceable guardians

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16. Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988) (citations omitted).

17. Younger v. Harris, 401 U.S. 37 (1971).

18. George D. Brown, *Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity*, 68 N.C. L. REV. 867 (1990).

19. *E.g.*, Teague v. Lane, 490 U.S. 1031 (1989).

20. Richard H. Fallon, Jr., *The Ideologies of Federal Courts of Law*, 74 VA. L. REV. 1141 (1988).

of federal constitutional rights, and active enforcers of federal constitutional remedies, against both state and federal governments."[21]

When one turns to the vast domain of private law, things are quite different. I would contend that state courts play the overwhelming role in formulating American private law — at least judge-made private law — and that there is no significant nationalist thrust, even among academics, to change this *status quo*. It is true that there are a number of areas such as antitrust, securities trading, and labor relations where the federal courts make law which is qualitatively and quantitatively important. Most of these areas do not fit the definition of federal common law if one adds the element of authorization at that stage. Relatively clear congressional authorizations, not just the broad authorizations of general jurisdiction statutes, are part of the picture, as is the inevitable lawmaking role that federal courts play in reviewing federal administrative agencies. Although antitrust law may be federal common law, it is not very problematic. Authorization provides legitimacy.[22] If we focus on not clearly authorized, free standing federal common law — the judicial activity which seems to most directly raise the issue of parallelism (not parity) between state and federal courts — we find that it does not occupy a substantial niche. Judge Friendly's famous article[23] recognized that it would remain a specialized kind of law, but may have suggested that its scope would be considerably broader than what I have described.

This view of the *status quo* in private law, and its apparent acceptance, suggests that Professors Hart and Wechsler were right when they penned their famous note on the "interstitial nature" of federal law.[24] This is one of the two most famous passages from the Casebook. The other is the "Dialogue,"[25] which portrays the state courts as primary and ultimate guardi-

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21. Akhil Amar, *Book Review*, 102 HARV. L. REV. 688 (1989) (reviewing HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM).

22. *See* Merrill, *supra* note 1, at 44.

23. Henry J. Friendly, *In Praise of Erie — And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

24. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533-34 (3rd ed. 1988).

25. *Id.* at 393.

ans of federal civil rights. Not surprisingly Professor Amar takes the "Dialogue" to task on this point,[26] presenting arguments for which he is well known about "the structural superiority of federal courts in federal question cases."[27] On the other hand, Professor Amar's extensive review does not discuss the "interstitial" note. For present purposes I will treat this as an example of silence constituting acceptance.

Acceptance is not universal, however. Professor Weinberg calls into question our "romantic attachment" to the Hart and Wechsler vision.[28] She paints a picture in which "the power and pervasiveness of federal governance" is apparent,[29] in which state and local governments are relegated to service delivery and such "homely matters as our marital status," and "our inadvertent, localized, or less interesting wrongs . . . ."[30]

Although I am not sure that examination of a torts or contracts casebook would bear out this conclusion, I think that the important point is that this descriptive passage also indicates Professor Weinberg's normative goals. She is, to borrow the public law terminology, a "nationalist" in private law matters.

Professor Weinberg's analysis suggests that we could see a private law analogue to the public law debate among federalists and nationalists. In this respect, her criticism of the *Agent Orange* decision, in which the Second Circuit refused to fashion federal common law, is particularly relevant.[31] She views this as a "quintessentially federal" case[32] and states that "[f]or mass disaster cases clearly invoking issues of national policy concern, like *Agent Orange*, like the aviation disaster cases, and like the multistate environmental disaster cases . . . the continued withholding of appropriate judicial federal lawmaking power is irresponsible."[33] Professor Weinberg is not alone in her criticism of *Agent Orange*.[34] Indeed, widespread interest exists in an in-

26. Amar, *supra* note 21, at 696-97.
27. *Id.* at 697.
28. Weinberg, *supra* note 1, at 818.
29. *Id.* at 819.
30. *Id.* at 818.
31. *Id.* at 830-31, 841-42.
32. *Id.* at 831.
33. *Id.* at 842.
34. *See* REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER 43 (1991).

creased role for the federal courts in complex disputes. This interest may be another example of the recurring phenomenon of liberal preference for national government solutions to domestic problems. A narrower perspective may reflect the practical difficulties which arise when a trial court must attempt to apply the laws of several states to a dispute.

The important point is that there is some pressure for an expansion of federal common law, despite my earlier observation about acceptance of the *status quo*. *Boyle* demonstrates that this expansion can occur, even where the pressure exists only on the defendant's side. One must ask whether this pressure would lead to additional limited blocks of law (for example, a counter-*Klaxon* federal choice of law), or to broad federal judicial lawmaking as Professor Weinberg suggests. Thus, her attack on the Hart and Wechsler vision of the primacy of state law plays a central role in her overall argument. My own view is that acceptance of this proposed role for the federal courts would bring about a vast transformation in the allocation of lawmaking roles between state and nation. Of particular importance is the ease with which federal *courts*, as opposed to Congress, create law,[35] and the fact that the federal common law they make is binding on the states under the supremacy clause.[36] Therefore, the nationalist-federalist debate which has played such a large part in federal courts public law issues could resurface if and when the role of the federal courts in private law disputes becomes a major area of contention.

C. *Federal Common Law and Ideology*

As these remarks suggest, questions concerning the desirability and legitimacy of federal common law have a potentially ideological dimension. Federalism is an obvious candidate. However, at this point I would like to focus briefly on another ideological issue, an obvious area of disagreement among liberals and conservatives: should federal courts' power in their lawmaking capacity be seen as co-equal and coordinate with Congress' lawmaking power? As a general matter, conservatives often down-

35. Field, *supra* note 1, at 925.
36. Weinberg, *supra* note 1, at 827.

play notions of co-equal status, emphasizing the political accountability and democratic legitimacy of the legislative branch. Professor Amar found such notions in the first edition of Hart and Wechsler. Writing from a liberal perspective, he excoriated the notion that the federal judiciary is a mere "servant of Congress."[37] In discussing congressional power over federal court jurisdiction he finds in article III the suggestion that "federal judicial power is equal and coordinate, not subordinate, to Congress' federal legislative powers."[38] Professor Amar celebrates *Brown v. Board of Education* as "call[ing] into question every central tenet"[39] of Hart and Wechsler's judicial philosophy, and states that "[a]s a matter of separation of powers, the civil rights cases exemplified the federal judiciary's equal and coordinate role within the national government."[40]

Again, I think we are dealing with a vision of the federal courts which was formulated in the context of public law adjudication. Whether it carries over to the federal courts' private law role is not clear. One of the great mysteries of the federal common law debate is why the federal courts should not occupy a role within the national government analogous to that of the state courts within the state governments. Why can't the federal courts make law whenever Congress can, granting to it the last word through the enactment of legislation? One would expect liberals to take this position, given their general view of the federal courts. Professor Weinberg certainly does. Consider the following:

> We have a judicial branch precisely because the legislature is not accountable enough. The traditional view is that it is the courts that protect the minority, or unpopular, interests from excesses of majority will. The antimajoritarian feature of courts is part of their reason for being. I would argue further that courts also advance the current majority will against the will of vanished majorities or against the will of narrow, passionate, well-funded minorities.[41]

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37. Amar, *supra* note 21, at 699.
38. *Id.*
39. *Id.* at 703.
40. *Id.*
41. Weinberg, *supra* note 1, at 844.

That is close to saying that courts are actually *better* than legislatures, at least when they reach what any particular observer regards as the "right" decision. Perhaps this is a foreshadowing of the future of the federal common law debate. This would certainly be a major development in our thinking about the role of the federal courts in private law. For the moment, most liberal commentators have not adopted this view, nor have they taken the position that the federal courts are initially equal to Congress. Professor Doernberg, for example, requires a statement of national policy from some other law-making body before the federal courts can fashion federal common law.[42] On this potentially important ideological issue the liberal position is ambivalent. The conservative position suffers from no such ambivalence, although Professor Doernberg is surely correct that conservatives have been known to deviate from it.[43] Generally speaking, conservatives are comfortable with values like federalism and separation of powers, and with advocating a reduced position for the federal judiciary. In the realm of federal common law, conservatives have often suggested that their general view of the federal courts draws specific support from one of the most important Supreme Court decisions in our history — *Erie Railroad Co. v. Tompkins*.[44]

D. Erie*: "New* Erie*" and the Two* Erie *Problems*

Erie is thought to be relevant to the federal courts' power to formulate federal common law of a substantive nature — the topic of this article. However, what most lawyers know as the "*Erie* problem" deals with a different set of issues: whether a federal procedural rule can apply in a diversity case in the face of a contrary state rule which might lead to a different outcome.[45] The Court has adopted differing approaches to this problem over the years. My point is that we have two distinct *Erie* problems, and that the principles and formulations which guide inquiry into one of them are generally not even mentioned in the other.

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42. Doernberg, *supra* note 1, at 802-04.
43. *See, e.g., id.* at 789-90.
44. 304 U.S. 64 (1938).
45. Hanna v. Plumer, 380 U.S. 460 (1965).

How did these different paths develop? Professor Weinberg notes that the answer may lie in matters of history and timing.[46] An important line of procedural cases came down following the promulgation of the Federal Rules of Civil Procedure during the same period as the *Erie* decision. It seems plausible that the Court would have applied *Erie*'s concerns about forum-shopping and federalism to these cases involving the administration of state law in the federal courts, even though *Erie* itself involved a more substantive question. The mystery is why the Court did not apply "*Erie* analysis" to the body of federal common law cases that was developing. The Court obviously thought that some federal common law could co-exist with *Erie*. However, in its early validation of federal common law in *Clearfield Trust Co. v. United States*,[47] the Supreme Court failed to illuminate the mystery.

While the Court has not been very helpful, academic commentators have offered a wide range of views on the relevance of *Erie* to the formulation of federal common law. One of the major recurring themes is that *Erie* is not relevant to the problem. Perhaps *Erie* can be relegated to the status of a statutory construction decision, at which point the question becomes whether and how to fit federal common law within the language of the Rules of Decision Act.[48] There is constitutional language in *Erie*, notably a seeming innovation of the tenth amendment. However, that aspect of the case may simply reflect the Court's understanding that the federal substantive rule before it was beyond the powers of the national government as they were then understood.[49] If an exercise such as judicial lawmaking is within the ambit of national power, then *Erie* is not on point. Another way to read *Erie* is to focus on its concern with forum-shopping and different laws in different courts.[50] Federal substantive common law presents no such concerns, since it is binding on the states. Alternatively, *Erie* may only limit the powers the federal courts receive from the diversity grant.[51] A final way to make *Erie* dis-

46. Weinberg, *supra* note 1, at 828.
47. 318 U.S. 363 (1943).
48. *See, e.g.*, REDISH, *supra* note 34, at 29-46.
49. Doernberg, *supra* note 1, at 796-97.
50. *See* Weinberg, *supra* note 1, at 827.
51. *See* Field, *supra* note 1, at 915.

appear is to suggest that it is so ambiguous that it provides little guidance for the federal common law problem.[52] Sic Transit Gloria *Erie*, or more precisely, there is now only one *Erie* problem.

A different approach to *Erie*, is to contend that it is highly relevant, and when properly understood, it establishes the doctrinal formulation for a wide ranging body of federal common law. Professor Weinberg is the most forceful proponent of this position.[53] For Professor Weinberg, the essence of *Erie* is that it is a case about spheres of lawmaking competence.[54] The real vice of *Swift v. Tyson* was not that federal judges were invading the domain of the states, rather it was their deciding cases on the basis of some general common law. "At the heart of [*Erie*] was the positivistic insight that American law must be either federal law or state law. There could be no overarching or hybrid third option."[55] Moreover, she points out, *Erie* also stands for the proposition that "once a court identifies the governing sovereign, whether the governing sovereign's law is statutory or decisional is not that court's concern."[56] Thus, Professor Weinberg concludes, if a matter is within the realm of federal authority the federal courts can make law to govern it.[57]

Despite these various academic endeavors, it seems reasonably apparent that *Erie* has not disappeared from the debate and that many people persist in finding in that case limits on the federal courts' ability to fashion federal common law.[58] There are several themes that might be developed to bolster a traditionalistic argument. The first is *Erie's* obvious desire to ensure the states' primacy as the formulators of private law. Federal common law threatens the states' ability to formulate private law even more than the law developed under *Swift* because of the potential for federal law to subvert state laws through supremacy and pre-emption.

Another point about *Erie* is that the federal rule in ques-

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52. *Id.* at 927.

53. *See id.* at 926.

54. *See* Weinberg, *supra* note 1, at 812-815.

55. *Id.* at 820.

56. *Id.*

57. *Id.* at 821.

58. *E.g.*, Boyle v. United Technologies Corp., 487 U.S. 500, 515 (1988) (Brennan, J., dissenting).

tion — the tort duties of an interstate railroad — may well have been within the powers of Congress as then understood.[59] If the Court realized this, the implication is unmistakable that it was drawing a distinction between the lawmaking powers of the federal courts and those of Congress *within an area of federal power*. As Professor Doernberg notes, this reading of *Erie* presents "enormous separation-of-power implications."[60] Beyond this aspect, there is a suggestion in *Erie* that the federal courts enjoy a lesser lawmaking competence:

> Except in the matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.[61]

Relying solely on the spirit of *Erie*, one would probably develop a legal landscape in which the states are the primary law formulators and federal law emanates primarily from Congress. However, it is also possible to get there by saying that the federal courts have co-extensive power with Congress to make laws, but that they do not exercise it out of a sense of judicial restraint. Alternatively, it may be that federal courts utilize state law even when they have power to formulate a federal rule. One of the mysteries of federal common law is whether it is possible to extend *Erie* beyond what the federal courts *ought not* to do to what they *cannot* do. Can we find in *Erie* meaningful limits, or even an outright prohibition on the fashioning of federal common law?

The subject of this year's Federal Courts Section meeting — the so-called "New *Erie*" doctrine — represents the Court's most significant attempt to impose limits on federal common law, and to base those limits on *Erie*. The parameters of this approach are thoroughly discussed in Professor Doernberg's recent article,[62] and I will discuss them only briefly here. Two important sources are Justice Powell's dissent in *Cannon v. University of Chicago*[63] and Justice Rehnquist's dissent

59. *See* Field, *supra* note 1, at 926.
60. Doernberg, *supra* note 1, at 796.
61. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
62. *See generally* Doernberg, *supra* note 1.
63. 441 U.S. 677 (1979).

in *Carlson v. Green*.[64] The key theme of these two opinions is that doubts about federal judicial lawmaking reflect concerns of separation of powers. The lawmaking power is vested in Congress, and exercises of judicial power such as *Swift v. Tyson*[65] invade that power. Because of the contexts in which they arose, the opinions do not draw substantially on federalism. Justice Powell, however, did rely in part on the limited jurisdiction of the federal courts,[66] a concept which both mirrors and furthers the limited nature of the national government itself.

What are we to make of New *Erie*? I view this doctrine as a significant development, although my opinion may reflect a vested interest in promoting this theory.[67] New *Erie* moves beyond cursory generalities about enclaves toward explaining why federal common law is suspect. This approach brings *Erie* directly into the picture and forces us to contend with its effect on federal common law more extensively than Justice Douglas' dismissive statement in *Clearfield* that *Erie*'s rule just does not apply. Moreover, New *Erie* forces us to scrutinize the possible separation of powers implications of the case. The passage that begins with "[e]xcept [for] matters governed by the Federal Constitution or by acts of Congress" suggests a highly limited lawmaking role for the federal courts.

I admit, nonetheless, that the New *Erie* approach does not "solve" the federal common law problem or any of its major mysteries. I think that this approach retains validity as a possible tool of analysis, but it suffers from several serious weaknesses. New *Erie* is an effective way of dealing with implied rights of action. This approach eliminates implied rights of action, a result which is correct in terms of respecting congressionally drawn balances and avoiding overjudicialization of areas which would otherwise be left primarily to federal administrative processes or to state law. The major problem arises when one attempts to extend New *Erie* to other areas of federal common law. Given New *Erie*'s apparent premise that federal courts

64. 446 U.S. 14 (1980).

65. 41 U.S. (16 Pet.) 1 (1842).

66. Cannon v. University of Chicago, 441 U.S. 677, 730-31, 746-47 (1979) (Powell, J., dissenting).

67. George D. Brown, *Of Activism and Erie — The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617 (1984).

lack common law power, how can there be any federal common law? *Boyle*, a post-New *Erie* case, exemplifies the problem. This case represents a classic example of Congress having power but declining to exercise it.[68] How can we take New *Erie* seriously, if the Court does not do so? In particular, the judicial branch's independent fashioning, on its own, of a military contractor defense, was a classic instance of the judiciary doing what Justice Powell warned it not to do. In *Cannon*, Justice Powell stated that striking competing interests in highly contentious matters is precisely the job of politically accountable legislators.[69] By not legislating Congress had left the contractor to the mercy of state law which might be pro-plaintiff. A theory of delegated lawmaking authority would reconcile *Boyle* with New *Erie*, but this theory is, at most, implicit in the Court's reference to areas committed to federal authority.

Professor Doernberg has made these points in his article, and my own elaboration of them here indicates partial agreement. There is another, essentially doctrinal, weakness in New *Erie*. The attempt at separation of powers analysis of federal common laws rests implicitly on a broader notion of the doctrine of separation of powers itself. That notion is one of a highly compartmentalized system in which each of the three branches is allocated specific, discrete powers, with no other branch exercising authority therein. This is precisely the view of separation of powers that prevailed within the Supreme Court at the time when New *Erie* was being formulated. One of the best known examples is *INS v. Chadha*[70] in which the Court struck down one-house legislative veto mechanisms. The general philosophy expressed in *Chadha* is that "[t]he Constitution sought to divide the delegated powers of the new Federal government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."[71] This sounds like New *Erie*.

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68. Boyle v. United Technologies Corp., 487 U.S. 500, 515 n.1 (Brennan, J., dissenting) (1988).

69. *Cannon*, 441 U.S. at 743 (Powell, J., dissenting).

70. 462 U.S. 919 (1983).

71. *Id.* at 951.

Although *Chadha* was not the only example of this approach, strict separation of powers was short lived. Beginning in 1985 the Court moved to a less rigid view of separation of powers advocated by Justice White in his earlier dissents.[72] The key to this view is a "flexible"[73] approach to the whole question and a rejection of "formalistic"[74] rules. No one branch should encroach on another or aggrandize its powers "at the expense of the others."[75] However, overlapping, shared powers are possible within this scheme, as the Court made explicit in *Mistretta v. United States* where it alluded to "a 'twilight zone' in which the activities of the separate Branches merge."[76] All of this is detrimental to the New *Erie* doctrine. Since that approach is rooted in the doctrine of separation of powers it is vulnerable to changes in the underlying doctrine. After these flexible cases one can certainly argue that federal common law poses few separation of powers problems since the lawmaking competence is shared and Congress has the ultimate power to prevent judicial aggrandizement or encroachment upon the legislative branch.

New *Erie* emerges from the above analysis weakened and flawed. However, any approach to federal common law that forces us to confront and deal with *Erie* serves an important function. I am troubled by the oft-voiced contentions that *Erie* is irrelevant or, properly read, a sweeping endorsement of wide-ranging federal common law. The essence of *Erie* is its emphasis on limited national power — the limited scope of the national government and the limited role of its courts. The tenth amendment rings throughout the constitutional portion of the decision. *Erie* seems even more of a tenth amendment decision than the anti-New Deal cases that preceded it[77] or the short-lived attempt to revive the amendment in *National League of Cities v. Usery*.[78] Perhaps efforts to make *Erie* go away stem from a general hostility toward any effort to give life to the tenth

72. *See, e.g., id.* at 967 (White, J., dissenting).

73. Mistretta v. United States, 488 U.S. 361, 381 (1989).

74. Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 851 (1986).

75. *Schor*, 478 U.S. at 850 (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

76. 488 U.S. 361.

77. For a discussion of these cases, *see* National League of Cities v. Usery, 426 U.S. 833, 868-69 n.9 (1976) (Brennan, J., dissenting).

78. 426 U.S. 833.

amendment.

Of course it will be noted immediately that this discussion is shifting away from New *Erie* toward the old *Erie*'s emphasis on federalism.[79] The view of federal courts as having less lawmaking competence than Congress — a view which New *Erie* bolsters — serves important federalism values. The federal courts create law more easily and quickly than Congress.[80] For example, in *Boyle*, Congress had considered establishing a contractor defense but had not acted.[81] The Supreme Court established this defense with a stroke of the pen. *Any* lower federal court can make federal common law which the state courts must follow and which may pre-empt their own state law. This is *Swift v. Tyson* with a vengeance, and reminds me of Justice Harlan's observation that *Erie* is something more than a case about forum-shopping.[82]

Thus, while I concede Professor Field's point that the problem of federal common law implicates federalism more than it does separation of powers,[83] it must be stressed that New *Erie*'s emphasis on separation of powers furthers *Erie*'s federalism goals. I am not simply making the classic Wechslerian observation that national separation of powers helps the states because they are represented in Congress.[84] The point is that the slowness of the national legislative process, reflecting in part the difficulty of crafting nationwide solutions, is one of the principal buttresses of the primacy of state law. Limiting the federal courts, beyond the limits imposed on Congress, is an essential part of this scheme, and advances the values of *Erie*. One can find echoes of this view even in criticisms of New *Erie*. Professor Doernberg, for example, would limit federal common law to "judicial creation of a rule that furthers policies as reflected in the various sources of positive law — the Constitution and federal statutes."[85] The important point in Professor Doernberg's analy-

79. *See* Doernberg, *supra* note 1, at 761-64.

80. Field, *supra* note 1, at 925; REDISH, *supra* note 34, at 35.

81. Boyle v. United Technologies Corp., 487 U.S. 500, 515 n.1 (1988) (Brennan, J., dissenting).

82. Hanna v. Plumer, 380 U.S. 460, 474 (Harlan, J., concurring) (1965).

83. Field, *supra* note 1, at 890 n.29.

84. Merrill, *supra* note 1, at 16 (discussing theories of Professor Wechsler).

85. Doernberg, *supra* note 1, at 802.

sis is what federal courts cannot do:

> The constitutional scheme of separation of powers is not transgressed provided the judiciary's creation of substantive rules is limited to those furthering a specific policy found in positive law. The federal courts should not be the initial reflectors of societal values that ordinarily are expressed in positive law.[86]

The notion of a less than co-equal role for the federal courts, differentiating them from their state counterparts, is an important component of New *Erie*. The fact that it is widely accepted has far greater implications for the future of the federal courts than does the fact that New *Erie*'s apparent prohibition of all federal common law has not taken hold.

II. The Polar Positions

The analysis thus far suggests that New *Erie* may play a role in ultimately reinforcing the middle ground position of limited federal common law. However the middle ground position is not universally accepted. New *Erie* is not the only current attempt to articulate an alternative view of the role of the federal courts in fashioning common law. This section will briefly examine two recent articulations of the polar positions that federal common law is illegitimate, and, alternatively, that the common law powers of the federal courts are presumptively co-extensive with the sovereign power of the national government. It is important to state at the outset that I take each of these positions seriously, in part because of respect for those who advocate them and in part because they are defensible positions.[87]

A. *The Polar Position of No Federal Common Law*

Professor Martin Redish's recent book, "The Federal Courts in the Political Order,"[88] illustrates this restrictive polar position. Redish posits a constitutional system that rests on two important principles. The "representational principle"[89] emphasizes popular sovereignty and political accountability; while the

86. *Id.* at 804.
87. *See id.* at 811.
88. REDISH, *supra* note 34.
89. *Id.* at 9-10.

"counter-majoritarian principle"[90] emphasizes the role of written limits upon the power of the representative branches and the correlative need for a body (the judiciary) to enforce those limits. In his view the problem of federal common law should be analyzed as an example of the representational principle at work.[91] Congress has addressed the matter and has barred the federal courts from fashioning federal common law. The courts must respect this bar, unless the statute violates some constitutional provision.

Redish finds the prohibition in the Rules of Decision Act. That statute provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[92]

For Redish the statute means what it says. What it says is that state law governs cases in federal courts unless there is a federal law on point which comes from a source other than the federal courts. The statute is both a directive to the federal courts and a limitation on them. The statute's historical purpose was to protect state interests by allowing state law to be displaced primarily through acts of Congress. Congress is the body in which state interests are considered and protected. The statute serves important, "inextricably intertwined" values of federalism and separation of powers.[93] Fairly read, it bars virtually all forms of federal common law, such as those involving federal proprietary interests, foreign relations, and the implication of private damage remedies from federal statutes.[94] If Congress has delegated the power to federal courts to create nonstatutory federal law, it is valid. Delegated lawmaking falls under the statute's exceptions for cases "provide[d]" for by an Act of Congress. Most federal common law, however, represents "free-

90. *Id.* at 75-76.

91. *Id.* at 29-46.

92. 28 U.S.C. § 1652.

93. REDISH, *supra* note 34, at 43.

94. Professor Redish recognizes that this would entail overruling a number of Supreme Court precedents.

standing substantive common law principles,"[95] which the Rules of Decision Act prohibits.

The Constitution does not play any role in this analysis. Apparently, Professor Redish does not find anything in the Constitution that blocks Congress from this sweeping action. One might view the doctrine of separation of powers as imposing restrictions on Congress' ability to limit the courts in their performance of the judicial function. However, for Redish the area of competence to make law is clearly one in which the "representational principle" holds sway. Nor does he see any need to invoke the Constitution, or its exposition in *Erie*, as an alternative ground for reaching the result that no federal common law exists, absent a congressional authorization. Redish hints at underlying constitutional issues,[96] and notes without elaboration the Court's cryptic statement that the Rules of Decision Act is "merely declaratory of what would in any event have governed the federal courts."[97]

In offering these views, Redish had an opportunity to go further and discuss the New *Erie* doctrine. Therefore, his omission is surprising, especially since New *Erie* would seem to bolster his general conclusions about federal common law. Although it would be stretching matters, perhaps Redish can be labelled a *de facto* member of this camp since he reaches a position similar to that of Justice Powell.[98] However, Redish is quite explicit in resting his position only on statutory grounds. Moreover, given Professor Redish's general position as a liberal-nationalist, he might be uncomfortable with a view of the federal courts as so *inherently* inferior to Congress in making law that they could do nothing even if Congress had not addressed the problem. This seems to contradict the federal courts "counter-majoritarian" role as enforcers against Congress. Professor Redish advocates a prohibition on federal judicial lawmaking, and he bases this on a separation of powers theory, but he is talking about what courts must do once Congress has spoken, not any competence or lack thereof inherent in the constitutional nature of things.

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95. REDISH, *supra* note 34, at 43.
96. *Id.* at 35, 37.
97. *Id.* at 157 n.27.
98. Doernberg, *supra* note 1, at 766.

Professor Redish offers a plausible reading of the Rules of Decision Act. His position would not mean radical change in our overall legal system any more than New *Erie* would. Current enclaves of federal common law would disappear, but they could reappear if Congress so desired. Nonetheless, his views represent a minority position. Most commentators have been able to fit federal common law within the Rules of Decision Act, usually by finding that a federal statute is relevant enough to the problem at hand to satisfy the Act's reference to "Acts of Congress."[99] Professor Weinberg goes further, urging dismissal of the Act as tautological and outdated.[100] The Supreme Court has never really explained how federal common law and the statute can coexist, but it obviously thinks they can.

If one is inclined to take a limited view of federal judicial lawmaking — and therefore inclined to look favorably on New *Erie* — the good news is that an influential scholar like Redish is on the same general side. The bad news is that he has not convinced anyone else. The fact that his views have not taken hold shows the persistent attraction of some form of middle ground approach to federal common law. Redish's views are further weakened by his failure to address *Erie*.

B. The Polar Position of Free-Standing Federal Common Law

Professor Weinberg articulates a strikingly different position on federal common law. Her basic thesis is that "there are no fundamental constraints on the fashioning of federal rules of decision."[101] This position rests on two key premises. The first is the notion of sovereignty: "the lawmaking power of a sovereign is co-extensive with its sphere of governmental interest. Where a sovereign's interest ends its power ends, but obviously that will not hamper it in any area of concern to itself."[102] The second premise is that the courts of any American sovereign are of equal lawmaking status with the legislature, at least until the legislature steps in. "The judiciary must have presumptive

99. *E.g., id.* at 803.
100. Weinberg, *supra* note 1, at 866-67.
101. *Id.* at 803.
102. *Id.* at 813.

power to adjudicate whatever the legislature and the executive can act upon. Without this principle we cease to be a nation of laws."[103] She rejects the need for "some sort of authorization before federal common law can be fashioned."[104] In particular, federal courts are no different from state courts. Thus she chides Professor Field for falling into "the trap of fancying state courts to be court [sic] of general common-law powers in a way that federal courts are not."[105]

This is pretty heady stuff, although a fan of New *Erie* will read it with a sense of dismay. In order to take this position, Professor Weinberg must grapple head on with *Erie*. She advances several arguments that I have previously discussed. For example, the law developed under *Swift* permits forum-shopping.[106] The type of judge-made law that *Erie* struck down is quite different from the federal common law that we are considering.

> *Federal* law was not applied under *Swift* and *federal* law was not struck down in *Erie*. No *federal* law was in conflict with state law in either case. At issue in each case was only a kind of state-like law, a second-guessed version which the federal courts were applying instead of the state's own version.[107]

Most importantly *Erie* bolsters federal common law through its emphasis on spheres of governmental competence and its emphasis on treating statutory and decisional law in the same way.[108] Thus, for Professor Weinberg, the Supreme Court in *Erie* "inescapably laid the intellectual foundation for identified *federal* common law."[109]

As is the case with Redish, Weinberg's views are certainly defensible from the perspective of textual analysis. The Rules of Decision Act does contain ambiguities, especially the limitation of the laws of the states to "cases where they apply." *Erie* itself is, admittedly, ambiguous. Nothing in that case explicitly forbids

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103. *Id.*
104. *Id.*
105. *Id.* at 812 n.45.
106. *Id.* at 827.
107. *Id.* at 874.
108. *Id.* at 828.
109. *Id.*

the creation of all federal common law. The prohibition is of "federal general common law," directed in that context to *Swift v. Tyson*. The Constitution confers the "legislative power" upon Congress, but it endows the federal courts with the "judicial power," a phrase which can embrace traditional formulation of common law rules.

Moreover, Professor Weinberg's approach has the doctrinal appeal of eliminating most of the mysteries in this area. To the question why federal courts are somehow different from state courts she replies that they are not. To the question why federal courts cannot do what Congress can she replies that they can. As for what limits *Erie* imposes she replies that it imposes none. Another doctrinal point in Professor Weinberg's favor is the notion that constitutional adjudication, statutory interpretation and the formulation of common law rules are closely related parts of the judicial process.[110] The unquestioned legitimacy of the first two strengthens the case for the third. Her invocation of the supremacy clause[111] is an important point. Since federal common law's application is compelled by the supremacy clause, this suggests that it is similar to the statutory law to which that clause refers.

Professor Weinberg's view is not generally accepted. This is an important point because she refers to her view of federal common law as "the true position"[112] and as "the clarified modern position."[113] She does admit that it is not the "official position,"[114] but the overall impression Weinberg conveys is that this is a temporary aberration. The Court has declined to find the general power Professor Weinberg would bestow upon it, at least if one accepts the definitional distinction made at the outset of this article between various forms of interpretation and free-standing federal common law.[115] The main body of recent academic writing stops short of her position and occupies some portion of the middle ground. The article by Professor Peter Westen and Jeffrey Lehman appears to embrace a broadly hos-

110. *See id.* at 807.
111. *Id.* at 816.
112. *Id.* at 805.
113. *Id.* at 806.
114. *Id.*
115. *See id.* at 823 (discussing "the 'pure' federal common law cause of action").

pitable attitude toward federal common law, at least as far as the Rules of Decision Act is concerned.[116] However, they are concerned with the classic "*Erie* problem" of essentially procedural rules, and much of their focus is on forum-shopping and inequitable administration of the laws.

My disagreement with Professor Weinberg stems from the fact that her view would vastly transform our system's allocation of private lawmaking competence. She is a strong nationalist, and rejects the Hart and Wechsler view of the primacy of state law. She is also a strong defender of the role of the national courts within the national government. Not surprisingly, she rejects any argument that the federal courts should not step in whenever Congress can. For her, "a prudential distinction between the judiciary and the legislature . . . seems *irrelevant* in any direct way to federalism."[117] The different ways in which the federal legislative and judicial processes work have major implications for keeping the states in their present primary role as makers of private law. This is the major goal of *Erie*. To a considerable extent, New *Erie* points in the same direction.

Professor Weinberg's work points in the opposite direction. It is a route which the legal system might take, and which has occasionally attracted the lower courts.[118] Despite *Boyle*, the federalistic tilt of the current Supreme Court makes any such development of Weinberg's theory unlikely on a large scale. The Court is committed to limits on federal common law. Interestingly enough, Professor Weinberg indicates some desire for limits as well. She notes that such policies as comity and federalism would frequently counsel the use of state law even when the federal courts have power to fashion their own law.[119] Another set of limits develops from the fact that in fashioning federal common law the federal courts would pay close attention to any relevant congressional policy.

Writers across the spectrum find limits on federal common law in favor of the use of state law. Professor Weinberg's limits,

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116. Peter Westen & Jeffrey S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

117. Weinberg, *supra* note 1, at 817 (emphasis added).

118. *See id.* at 833.

119. *Id.* at 805.

if any, are judicially imposed rather than compelled by any basic statutory or constitutional authority. It is a matter of "ought not" rather than the "cannot" which underlies Professor Redish's position and New *Erie*. What we see in the work of these two commentators are well thought out, internally consistent, polar positions. In the next section, I will consider the middle ground view that some federal common law is permissible, but that there are discernible limits on the courts' ability to fashion it. The reader may have already hit upon the realization that this could represent an attempt to have one's cake and eat it too.

III. The Middle Ground — A Fit With (New) *Erie*?

In this section I will treat somewhat briefly what I refer to as the middle ground position. My discussion is brief not because this view merits brevity, but because it is well-known and extensively discussed. It is articulated in numerous Supreme Court opinions on federal common law, as that term is used here, and in the work of many commentators including two of my co-panelists and our moderator. It is widely accepted, although one should note important differences in just how broad the middle ground can be. According to Professor Field, for example, "no meaningful limits on federal common law have been articulated or adopted, and . . . the bounds of federal common law are potentially much broader than is generally supposed."[120] In the court's formulations, on the other hand, one is likely to find emphasis on the narrow scope of federal common law.[121]

The first premise of the middle ground approach is that there can be federal common law. This law can be made, it is often said, in a limited number of enclaves, or in areas of "uniquely federal interest."[122] The fact that constitutional and/or statutory provisions deal with a particular area often plays a prominent role. Here, however, I wish to suggest a distinction. In the Court's analysis these provisions are sometimes invoked to show just how federal the area is, in particular that it is impor-

120. Field, *supra* note 1, at 884.

121. *E.g.*, Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988).

122. *Id.*

tant to the national government.[123] It is the "federalness" that confers lawmaking power rather than any textual grant. On the other hand, recent commentators seem more to emphasize the role of positive law as the source of the power to make law. Thus Professor Field states as "the primary limit on federal common law today" the following: "there must be a source of authority for any given exercise of federal common law power. This limit flows from the proposition that authority must exist for any exercise of federal power, coupled with the proposition that there is no enactment giving federal courts power to make common law generally."[124] Professor Merrill states generally that federal judicial lawmaking is appropriate if authority has been either expressly or impliedly delegated.[125] Broader formulations are possible such as his concept of pre-emptive lawmaking,[126] but the emphasis on authority suggests that federal courts get their lawmaking from Congress or from some constitutional provision other than article III. There is no general inherent power to act just because Congress could act. Whether the fact that Congress has acted confers the power depends on how strictly one construes the relevant statute.

Both the notion of enclaves and that of delegated authority reflect the second important premise of the middle ground position: that the federal courts' power to make common law is limited. Restricting this power to specified enclaves effectively limits it, but this approach does not provide a satisfactory explanation as to why there is power there but not elsewhere. The main debate within the *Boyle* Court was over whether the tort liability of military contractors was close enough to the liability of the United States under its contracts and to the civil liability of federal officials so that federal common law could be fashioned in this area previously left to the states. Neither side explained adequately why there could be federal common law in *those* areas. The commentators' analysis has the advantage of focusing on sources which may provide guidance. In particular, the notion of delegated authority carries with it the notion of

123. *Clearfield* is an example of this approach.
124. Field, *supra* note 1, at 899.
125. Merrill, *supra* note 1, at 46-47.
126. *Id.* at 36-39.

limits. The federal courts can only create federal common law within the sphere of their delegated authority, and that sphere is narrower than the general governmental authority of the United States.

This way of looking at federal common law is highly congruent with New *Erie*. It accepts the notion that federal courts do not have the general common law authority of state courts[127] and that their reach is not as broad as that of Congress.[128] Both New *Erie* and the middle ground represent an attempt to impose a "cannot" on the federal courts beyond saying what they should not do. The middle-grounders' emphasis on the role of statutory authority suggests that separation of powers concerns are indeed important.[129] Conversely, nothing in New *Erie* prevents the federal courts from fashioning federal common law if so authorized by Congress. It is not a theory of improper delegation.

Looked at from the broader New *Erie* perspective of limiting the federal judicial role in making private law, there are, however, two minor problems with the middle ground approach. First, it is not clear whether *Erie* plays much of a role in getting to the middle ground. In judicial opinions one can find *Erie* cited as having overruled *Swift*, alongside the notion that there can be *some* federal common law.[130] But the notion that *Erie* might draw the relevant line is rarely explored. Does *Erie* suggest that a specific statutory authorization is normally required (a "separation of powers" reading) or that at some point statutes dealing with a particular matter "federalize" it so that the federal courts can exercise an inherent common law power to deal with highly federal matters (a "federalism" reading)? As discussed above, academics who support the middle ground do not necessarily base their views on *Erie* to any great extent. Professor Field finds that *Erie* is ultimately ambiguous,[131] while Professor Doernberg views it essentially as a decision about the

127. *See* Field, *supra* note 1, at 898-899.

128. *See* Doernberg, *supra* note 1, at 804.

129. *But see* Field, *supra* note 1, at 890 n.29.

130. *E.g.*, Boyle v. United Technologies Corp., 487 U.S. 500, 526 (1988) (Brennan, J., dissenting).

131. Field, *supra* note 1, at 924-27.

powers of the national government.[132] New *Erie* goes further. It is an effort to further *Erie*'s federalism goals and principles in an era of almost unlimited congressional power by restricting the power of the federal judiciary. Professor Merrill, it should be noted, develops this theme extensively.[133]

Another problem with the middle ground is how strict an approach to statutory interpretation it seems to envisage. If one is actually looking to statutes for authorization to make law the mere existence of a statute touching on a matter may not be enough. I tend to agree with Professor Redish's criticisms of approaches that "strain the concept of 'statutory interpretation' to the linguistic and conceptual breaking point by characterizing the unabashed exercise of judicial lawmaking power as falling within the category of 'interpretation' every time a court can find a statute even remotely relevant to the problem at hand."[134] On the other hand, if one views the federal courts as having inherent power to make law in an area once Congress has federalized it, flexible notions of furthering legislative policy may well come into play.

New *Erie* is an attempt to limit federal judicial lawmaking power. So is the middle ground, in most instances. Perhaps it represents a "modified New *Erie*" along the following lines: federal courts can generally make federal common law only when Congress has authorized them to do so with some specificity; beyond that they possess a limited inherent power to fashion it when the need to enforce a constitutional provision or the structure of the governmental system justifies this judicial role. Other formulations are obviously possible. This suggestion, which is closest to Professor Merrill's views, allows for federal common law and reflects the possibility of some flexibility in separation of powers analysis. At the same time it advances federalism. That sounds a lot like the middle ground. I have made the link as a matter of power. It is important to note, however, that Professor Field reaches a middle ground position more as a matter of judicial choice than as a matter of power, despite her emphasis on the need for an authorization. I begin the next section

132. Doernberg, *supra* note 1, at 796-97.

133. Merrill, *supra* note 1, at 15-19.

134. REDISH, *supra* note 34, at 36.

with an analysis of her views on judicial choice of state law both because they are an important contribution and because they reflect the persistent theme that federal common law should somehow be limited.

IV. The State Law Finesse and The Recurring Theme of a Limited Federal Judicial Rule in Private Lawmaking

A. *The (Triumphant?) Return of State Law*

Professor Field is well aware of the fact that "[s]tates' interests, and the scope of state lawmaking, could be mightily affected by a declaration that courts' power to make federal common law was as broad as Congress' lawmaking power, even if the courts could not go beyond the Congressional sphere."[135] She notes the point that I have stressed earlier in this article — "federal courts make law more easily, more readily, than Congress will."[136] Professor Field contends that "judicial restraint"[137] can prevent this, that "broad judicial power need not necessarily result in broad federal common law . . . ."[138] She views the judicial task in this area as entailing a "two-prong"[139] analysis in which a federal court first decides whether it has power to adopt a federal rule and then decides whether to utilize state law. The key point is that state law will often prevail at the second prong through the operation of "at least a mild presumption for state law, and possibly a weighty one."[140]

The same themes are found in Professor Weinberg's analysis. She agrees with the two-prong analysis,[141] but suggests that comity and federalism will play an important role in actual choice.[142] Thus, although there is federal judicial *power* — broad for Professor Field, even broader for Professor Weinberg — there would not necessarily be broad federal common law. Perhaps this is the best of all possible worlds, but it does

135. Field, *supra* note 1, at 924.
136. *Id.* at 925.
137. *Id.* at 884.
138. *Id.*
139. *Id.* at 896.
140. *Id.* at 962.
141. Weinberg, *supra* note 1, at 837.
142. *Id.* at 896.

raise several questions.

To begin with, how much restraint would the federal courts show once a broad lawmaking power was generally recognized? Judicial restraint is sometimes in short supply. Might federal courts federalize an area any time they didn't like the relevant state law? Multi-party, interstate disputes seem a prime candidate. Professor Field views much of what is now left to state law as left there as a matter of longstanding judicial choice exemplified by *Erie*.[143] That choice could change.

The role of Congress enters the picture in several ways once one accepts broad judicial power. How would the courts handle Congress' nonaction in a given area? That might be viewed as an implicit conclusion that state law should continue to operate. Alteratively, nationalist pressures might be brought to bear on the judiciary to do its (now co-equal) part. Professor Weinberg discusses the "pressure for federal common law for aviation torts and environmental disasters . . . ."[144] I quote the following passage at length to show where state law and deference to Congress may really stand:

> If Congress is in gridlock, must that disable the Supreme Court from rationalizing mass disaster litigation? The inaction of Congress in the face of so much proposed legislation says very little about national policy, save that powerful minorities are likely to be aligned on each side. Unlike legislatures, courts can attempt to strike policy balances on a case-by-case basis, feeling their way toward lines of responsive authority.[145]

Professor Field does not take her arguments for federal judicial power to this extent. She does, however, conclude her piece with the apparent hope that the argument for displacing state law will be made more frequently.[146]

Another question is how the broad recognition of federal judicial power to make free standing common law would affect federal question jurisdiction. The theme that the federal trial courts are overworked is heard with increasing frequency, recently bolstered by the Report of the Federal Courts Study

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143. Field, *supra* note 1, at 979-81.
144. Weinberg, *supra* note 1, at 845.
145. *Id.*
146. Field, *supra* note 1, at 984.

Committee.[147] The Supreme Court's approach to the "arising under" problem has helped keep the caseload in check. However, federal common law cases can arise under federal law for purposes of section 1331 of Title 28.[148] What would be the jurisdictional status of a case in which a federal trial court had power to fashion a federal rule to govern the plaintiff's claim, but chose to utilize state rules of decision? If the basic choice about the rights and duties which the plaintiff must plead is a federal choice, and if state law does not operate of its own force, the result might be considerable expansion of federal jurisdiction to cover cases where the need for a federal trial forum may not be great. I suspect the courts would figure out some narrowing solutions, but the problem needs to be fully considered.

Perhaps most troublesome is the question of what happens to state law when it is seen in a wide body of cases — perhaps as wide as the reach of the national government — as operating not of its own force but by some form of federal sufferance. State law would continue to exist, but it would be considerably less important than it is now, particularly in "big" cases. As Professor Field recognizes, our legal system would be "enormously different" if federal judicial and legislative power were co-extensive in operation.[149] The biggest change would probably be in the status of state courts vis a vis federal courts. The latter would become the dominant expositors of private as well as public law. Even when they adopted state law it would often only be because they approved of it. Would not federal courts become the dominant expositors of what state law ought to be? And what of experimentation and the laboratory role? Many of the cutting edge cases might be those in which the federal courts fashioned their own law or developed what they thought state law ought to be — perhaps as national consensus law. The locus of legal creativity could change, and the thrust of pre-emption could affect it as well. (Indeed, given the federal courts' greater freedom, might the outcome of a case vary depending on whether it is brought in state or federal court?) As all these

147. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990).

148. *See* Weinberg, *supra* note 1, at 820 n.80; Field, *supra* note 1, at 897. *See id.* at 898 n.69 (distinguishing the cause of action and remedy from other issues).

149. Field, *supra* note 1, at 980.

questions show, the state law finesse has its limits as a limit. It does, however, bring us back to a recurring theme in the federal common law debate.

B. *The Recurring Theme of Limits — New* Erie *Vindicated?*

Perhaps the important fact is that even writers such as Professor Weinberg, at the nationalist pole, and Professor Field, on the broadest side of the middle ground, want to assure their readers that their theories will not result in an unlimited federal common law. (In Professor Weinberg's case these assurances are weakened by other parts of the analysis, but they are there.) Indeed, every writer I have discussed foresees limited federal common law, and most seem to think this is a good thing. Professor Redish finds it proscribed by Congress unless Congress authorizes it. For him, "the underlying legislative purpose intended to be served by the Rules of Decision Act, originally enacted by the very first Congress, [is] relatively clear. In enacting that legislation, Congress was attempting to preserve the political values of federalism by curbing the one branch of the federal government most feared as a threat to state power."[150] Given his emphasis on the representational principle, I believe he accepts that rationale today. The emphasis on authorization and/or national policy in the articles by Professors Merrill and Doernberg also leads to a limited federal common law, as does other academic writing focussing on the enclave theory. The notion of a limited role for the federal judiciary in private law adjudication seems a fundamental and widely accepted aspect of our legal system.

This is a recurring theme, and it is worth repeating some of the recurring themes that underlie it. The national government is one of limited powers. The federal courts are courts of limited jurisdiction; they are not to function as the general megacourts for the entire country. A deference to state private law reflects the federalistic value of nonuniform approaches and permits the several states to serve as laboratories. The political accountability of Congress and its perceived concern for state interest make it the preferred body for any displacement of state private law. As some writers have seen, transferring this role to the federal

150. REDISH, *supra* note 34, at 35-36.

courts would vastly transform our legal system.

These themes are not simply consistent with the Court's decision in *Erie*. The notions of a limited national government and limited national courts lie at the heart of that opinion. Thus it is no surprise that *Erie* is so often cited as an important guide to the federal common law debate. New *Erie* should be seen as part of this debate. It represents an attempt to grapple with the dilemma of preserving the value of limitedness after a period of constitutional development which left the national government as a whole virtually without limits. Restricting the federal courts' role in private law helps preserve the federal system extolled in *Erie*. On a narrower level it is consistent with that Court's rejection of *Swift*. After all, Justice Story and others hoped that that version of federal common law would become uniform and dominant throughout the land. I think that New *Erie*'s failure, if that is the proper word, occurred at two levels. It could not fit comfortably with such developments in the legal system as the admitted existence of some federal common law and the growth of flexible separation of powers doctrine. It also never succeeded in translating what "should not" be done into what "cannot" be done. The desire to present the limits or prohibitions on federal common law as a matter of a rule, with a source in positive law, keeps cropping up. Even Professor Field refers approvingly to "the rule that the commerce clause itself does not support affirmative judicial rulemaking,"[151] although she quickly adds that the rule is essentially self-imposed judicial restraint. Whatever its faults, New *Erie* responded to a felt need to place the rule on firmer ground.

V. Conclusion

Recent federal courts scholarship has seen a number of significant analyses of the common law power of federal courts. These range from the prohibitive view, founded on the Rules of Decision Act, through a broad middle ground, emphasizing the need for authorization, that permits a range of federal common law, to an inclusive view under which the federal courts enjoy, presumptively, the same lawmaking powers as Congress. The

151. Field, *supra* note 1, at 980.

New *Erie* phenomenon can be seen as an important part of the recent debate over federal judicial lawmaking. Its thrust was to differentiate sharply between the courts' powers and those of Congress. Viewed as a ban on federal common law, New *Erie* may have failed to account for the existence of such law, although that fault might be cured by delegation theories. It also seemed to emphasize strict separation of powers at a time when the Court was about to move strongly toward a flexible approach. Still, New *Erie* is a helpful contribution to the ongoing debate. It asserts the importance of *Erie* itself, an important step given efforts to make that case disappear or to turn it into a beacon of nationalism. It furthers the goal of limited federal judicial power, a central aspect of *Erie*'s overall theme of limitedness. Broad federal judicial lawmaking power, perhaps co-extensive with that of Congress, runs counter to what *Erie* stands for. To say this is to take a stand grounded more on federalism than separation of powers, although the two are closely intertwined as Professor Redish reminds us. I think the important thing is to take that stand. Most of us seem to agree on what federal courts "ought not" to do. If that is so, perhaps it is worth continuing the endeavor to delineate what they cannot do.